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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re Marriage of KIMBERLY A. and
WILLIAM F. SANTORE II.

KIMBERLY A. SANTORE,

Appellant,

v.

WILLIAM F. SANTORE II,

Respondent.

G055121

(Super. Ct. No. 13D005717)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Erick L. Larsh, Judge. Affirmed in part. Modified in part. Reversed and remanded in part with directions.

Kimberly A. Santore, in pro. per., for Appellant.

Law Offices of Indu Srivastav and Indu Srivastav for Respondent.

* * *

In this marital dissolution proceeding between Kimberly A. Santore (Kim) and William F. Santore II (Bill),¹ Kim appeals from the court's judgment on spousal and child support, and attorney fees.²

Kim contends the court erred in the following ways: It failed to award retroactive temporary child and spousal support; its permanent child and spousal support awards were unfairly low; it denied Kim the opportunity to be fully and fairly heard before an impartial decision maker; it wrongly awarded Bill reimbursement of \$13,677 for 2013 taxes; and finally, it wrongly denied her request for attorney fees and costs.

We agree with Kim's contention the court improperly awarded Bill reimbursement of \$13,677 for 2013 taxes he paid on Kim's behalf; substantial evidence supported an award to Bill of only \$8,781. Consequently, we modify the judgment to reduce the reimbursement for 2013 taxes to \$8,781. We also reverse the court's failure to award retroactive temporary child and spousal support. The court improperly based its decision on the absence of irrelevant evidence. We remand the matter to the trial court to determine whether a retroactive modification is merited based upon the actual income of the parties during the period from March 10, 2014 to the commencement of trial. In all other respects, we affirm the judgment.

¹ To avoid confusion, we adopt the parties' use of the familiar form of their first names. We mean no disrespect.

² Kim's appeal is taken from the court's statement of decision and it appears that no judgment was ever entered based on that statement of decision. "The general rule is that a statement or memorandum of decision is not appealable. [Citations.] The rule's practical justification is that courts typically embody their final rulings not in statements of decision but in orders or judgments. Reviewing courts have discretion to treat statements of decision as appealable when they must, as when a statement of decision is signed and filed and does, in fact, constitute the court's final decision on the merits." (*Alan v. American Honda Motor Co., Inc.* (2007) 40 Cal.4th 894, 901.) Here, the statement of decision was signed and filed and constitutes the court's final decision on the merits. Accordingly, we treat the statement of decision as an appealable judgment.

FACTS

June 2013 Dissolution Petition and Early Pension Payout Election

On June 19, 2013, Kim petitioned for dissolution of marriage and filed a request for order (RFO) on child custody, support, and visitation; spousal support; property restraint; and attorney fees. She and Bill had been married for 20 years and 7 months. They had three children, all of whom were minors when Kim filed the dissolution petition. The youngest child — their son M. — had special needs due to a genetic condition. Kim's income and expense declaration showed she had inherited over \$600,000 within the past 12 months and that she was a 53-year-old attorney who had been a homemaker for the last 16 years.

On June 18, 2013 (the day before Kim filed the dissolution petition), she and Bill had agreed to take an early payout of Bill's retirement pension from his employer, Thales Raytheon (Raytheon). Kim had agreed to the early payout only on condition that Bill continue working until the parties mutually agreed he could stop. At that time, Bill was unaware Kim planned to file for dissolution of their marriage.

The pension was to be paid out over a five-year period and included three categories of funds: (1) nontaxable return of contributions; (2) distributions which qualified to be rolled over into an individual retirement account (IRA) and which constituted about two-thirds of the pension (qualified funds); and (3) taxable nonqualified distributions (nonqualified funds). Bill rolled the qualified funds, as they were distributed, into an IRA.

March 2014 Temporary Support Orders

At the March 10, 2014 hearing on Kim's June 2013 RFO, Kim's counsel requested that some of the pension distributions be considered income to Bill for purposes of calculating temporary support.

Bill's counsel explained that Bill and Kim shared an IRA rollover account and another retirement account into which Bill had deposited all pension distributions with two major exceptions: (1) some monies were used to pay their eldest daughter's college expenses, and (2) because Kim had wanted Bill to move out of the family home, both parties had taken equal distributions from the retirement account and Bill had used his distribution to make a down payment on a condominium residence.

Part of the pension was Bill's separate property. A qualified domestic relations order (QDRO) attorney, Nancy Bunn, had finished draft QDROs and Raytheon had approved them. Kim stated the current problem was that she wanted her 34 percent share to come to her as a gross amount (rather than net of Bill's taxes), so she could pay taxes on it at her lower tax rate. Bill suggested the problem could be quickly resolved by using the couple's other pretax accounts to pay Kim the differential. Kim stated she wanted liquid assets and not tax-deferred assets, and that the percentage owed to her was unknown. Kim's counsel stated that, if the QDRO issue were bifurcated and the parties then entered into a QDRO, the issue could be resolved at a later date.

With the parties' agreement, the court reserved the issue of retroactive temporary spousal and child support to the time of trial when the actual pension income figures would be known, with credit given to Bill for any payments made by him. The parties were to put forth at trial their evidence on the pension, including the "accounting" for all payments made. If the parties entered into QDROs and wanted the court to reevaluate the temporary orders at trial, they were to "preserve that issue for trial" and show the facts at trial.

The court ordered Bill to pay Kim monthly temporary spousal support of \$3,790 and child support of \$3,190 (\$1,196 for one child and \$1,994 for another child) (guideline amounts based on the DissoMaster), as well as a percentage of his 2014 bonus pursuant to *In re Marriage of Ostler & Smith* (1990) 223 Cal.App.3d 33 for both spousal and child support. The court warned Kim she would need to become self-supporting. (*In*

re Marriage of Gavron (1988) 203 Cal.App.3d 705 (*Gavron*).) The court granted Bill's request for appointment of a vocational examiner at his own cost and if he so desired.

April 2014 Defective QDRO

On April 7, 2014, the court entered a status only dissolution judgment. The court also entered an interim order preserving Kim's right to pension benefits pending entry of judgment on remaining issues. In this respect, the parties agreed to employ Nancy Bunn, Esq., to prepare QDROs for the retirement plans.

On April 22, 2014, the court entered QDROs — prepared by Bunn and signed by Kim and Bill — for the pension plans. Unfortunately, one QDRO had a significant typographical error, ambiguously stating that Kim's interest was "(40%) 34%." The defective QDRO was subsequently rejected by Raytheon.

Kim's September 2014 RFO on QDROs

On September 18, 2014, Kim filed an RFO seeking (1) the parties' signing and filing of her proffered amended QDRO, and (2) an attorney fee and sanctions award. She attached the declaration of Darren J. Goodman, Esq., who listed his qualifications as a retirement plan expert. Goodman's declaration was based on his understanding that Kim had received no pension distributions. Goodman had prepared a QDRO that assigned Kim 78.22 percent of the qualified funds and had obtained Raytheon's preapproval of his draft QDRO.

One exhibit to Kim's RFO contained Bunn's June 2014 e-mail message with the subject line, "Re: Case from Hell (Marriage of Santore)." Bunn's e-mail message stated that when she (Bunn) discovered the typographical error on the QDRO signed by Kim and Bill, she had amended the QDRO and sent it to Kim and Bill for their signatures. Bunn's e-mail message further stated that, although Bill had signed the amended QDRO, Kim had failed to do so, and yet it was Kim who was complaining that Bill and Bunn were uncooperative.

On October 3, 2014, Kim filed a supplement to her RFO. Kim stated Bill and his counsel had refused to sign Kim's proffered amended QDRO and therefore Kim had prepared an updated amended QDRO. The amended QDRO assigned Kim 81.92 percent of the qualified funds. Kim also requested modification of her temporary spousal and child support.

In opposition to Kim's RFO, Bill declared Kim had been paid or credited with around \$87,000 from one retirement account, while Bill had received or been credited with around \$85,000 from the same account, and therefore Goodman was incorrect in stating Kim had received no pension payments. Bill further declared he had previously proposed that Kim receive 40 percent of the remaining pension payments (instead of the agreed 34 percent) in order to address Kim's concerns about tax consequences. Although Kim's then counsel had initially agreed to the proposal, Kim had rejected it and chose to stay with the agreed 34 percent.

Bill attached the declaration of Richard R. Muir, who declared that Kim and Goodman were attempting to have Kim's share of benefits taken entirely from a tax-qualified plan, leaving Bill with unqualified benefits which were taxable upon distribution and which would be subject to creditors if Raytheon went bankrupt.

November 2014 Stipulation on Division of Pension Distributions

At a November 12, 2014 hearing on Kim's September 2014 RFO, Goodman and Muir testified. The court stated its belief that the parties should equally share any risks and tax burdens. It suggested that, during the break, the matter could be resolved by the parties, their counsel, and the experts Goodman and Muir.

After the break, both counsel informed the court the parties had reached a stipulation. In the stipulation, the parties acknowledged that Kim had received payments totaling \$69,988.19 from the qualified plan, while Bill had received \$80,000. Kim's share of the qualified and nonqualified plans was 34 percent. The court questioned the

parties and found they had knowingly waived their right to continue the trial as to the QDRO issue.

Both parties' counsel agreed to meet prior to trial to try to resolve remaining issues. With the parties' agreement, the court set a mandatory settlement conference for December 16, 2014.

August 2015 Settlement Agreement

After an August 17, 2015 mandatory settlement conference, the court entered judgment on property division pursuant to the parties' stipulation. The stipulation divided the parties' vehicles; certain banking and investment accounts (not including the pension plans governed by QDROs); airline mileage and hotel reward points; and Schwab restricted stock awards.

The court reserved jurisdiction over spousal and child support; reimbursement issues from Kim to Bill and Bill to Kim; *Epstein* credits and *Watts* charges;³ division of two IRA accounts; attorney fees and costs; and a life insurance policy.

³ *In re Marriage of Epstein* (1979) 24 Cal.3d 76 allows "reimbursement for what is commonly referred to as an 'Epstein Credit.'" (Raye et al., Cal. Civil Practice: Family Law Litigation (2019) § 6:17, p. 21.) "The court has jurisdiction to order reimbursement in cases it deems appropriate for debts paid after separation but before trial. [Fam. Code, § 2626.]" (Raye, p. 20.) "In contrast to the *Epstein* Credit is the 'Watts Charge,' by which a party is charged with the fair market value of the use of an asset to the extent that it exceeds the payments. [*In re Marriage of Watts* (1985) 171 Cal.App.3d 366]." (*Id.* at p. 21)

Trial

Trial commenced on January 4, 2016. By then, Kim was representing herself in propria persona.⁴

During his testimony, Bill explained how the pension benefits were periodically distributed to the parties: Each party received his or her share of the qualified funds and the return of contributions directly from Raytheon. In contrast, Raytheon sent the nonqualified funds directly to Bill in the form of a check; Kim's 34 percent share was then transferred to her every month via electronic transfer.

In June 2018, Bill would receive his final pension distribution. Kim would receive her final distribution of nonqualified funds in June 2018, but her final qualified funds distribution would be in the spring of 2020.

Bill requested reimbursement from Kim for 34 percent of his payments for their two daughters' college tuition.

Trial was held on various dates for more than one year. Finally, on February 9, 2017, the parties rested their cases. On that same day (the last day of trial), Kim submitted an updated trial brief; the court refused to consider it.

April 2017 Statement of Decision

On April 25, 2017, the court issued its written statement of decision. The court stated M. was the only minor child at the time.⁵ The court awarded sole physical custody of M. to Kim, joint legal custody to both parties, and about a 22 percent timeshare to Bill. The court found Kim had made unilateral decisions regarding M. in violation of the joint custody orders. The court ordered the parties not to incur any costs

⁴ Prior to trial, Kim had utilized the services of seven different attorneys.

⁵ Bill and Kim's youngest daughter graduated from high school in June 2015 and was in college by February 2017.

for items such as educational, medical or psychological counseling for M. without the other party's express agreement (with the exception of emergency medical care), and further ordered that any such costs incurred by unilateral decision would be borne solely by the party incurring them.

The court found it was disadvantaged by Kim's late filing (on the last day of trial) of her income and expense declaration. The court awarded Kim monthly child support of \$2,762 for M., plus a percentage of Bill's bonus, until M. turned 19 years old or was no longer a high school student.⁶ The court found "no evidence presented that [M.] was a special needs child requiring support beyond the 18 years or 19 if a full time high school student," and found Kim's exhibit 106 particularly helpful in this regard.

The court awarded Kim monthly spousal support of \$2,350 until remarriage of Kim, death of either party, or further order of the court. The court considered Family Code section 4320 and other statutes in fixing permanent spousal support.⁷ The court made its findings with respect to each statutory factor. The court found, for purposes of determining Kim's earning capacity, that she is a licensed California attorney (on inactive status) who had practiced law for 10 years, but had not worked in the past 17 years due to domestic duties.

The court denied Kim's request for reimbursement of M.'s counseling costs. The court ordered Bill to reimburse Kim for half of M.'s speech therapy costs.

The court denied Kim's request that temporary child and spousal support be retroactively increased. The court found it "was not presented with evidence as to what was paid by either party since the orders for temporary support were made."

⁶ M. turned 18 years old on the date of the statement of decision. Kim testified at trial that M. was scheduled to graduate from high school in June 2018.

⁷ All statutory references are to the Family Code unless otherwise stated.

Ruling on Kim's Request for Attorney Fees

On April 25, 2017, and concurrently with the issuance of the court's statement of decision, the court ruled on Kim's posttrial request for attorney fees. The court again made findings on the factors specified in section 4320. The court concluded: "[Kim] represented herself in [propria persona] during the hearings in the year [preceding] the trial and in the trial itself. [Kim] has paid \$204,406.27 for the services of seven different attorneys, each having been substituted out before the other began representation, until November 16, 2015, when [Kim] substituted herself in [propria persona] and substitut[ed] Attorney Eisenhut out of the case. [Bill] has been represented by Attorney Indu Sirvastav throughout the proceedings. Both parties have argued that the other should be sanctioned under [section] 721 for their failure to promote settlement in this case. [¶] Unfortunately, the [QDRO] attorney, Nancy Bunn, [who] prepared the initial QDRO for the non-qualified pension, prepared an order that had a mistaken calculation, which, in the Court's impression, began the multi-year litigation with a growing sense of distrust and misunderstanding on the part of [Kim] that was exacerbated by the revolving door of attorneys advocating on her behalf. To compound the problem was [Kim's] unfamiliarity with family law and her unreasonable expectations regarding the outcomes, positions that in the end, appear to be within [Bill's] initial settlement offers at the outset of the case. [¶] Having considered the arguments of the parties, the briefs filed on behalf of each [party] requesting attorney fees and their reasons [therefor], the Court finds that each party shall be responsible for their own attorney fees."

DISCUSSION

Retroactive Temporary Child and Spousal Support

Kim contends the court erred under the abuse of discretion and substantial evidence standards of review by failing to award retroactive temporary spousal and

guideline child support based on Bill's actual income from March 1, 2014 to the date of the permanent child support order.⁸ Kim requests that we remand the matter to the trial court "to enter an order for combined retroactive child and spousal support of \$19,500 per month less actual support paid by Bill."

In its statement of decision, the court denied Kim's request for retroactivity of temporary support. The court found it "was not presented with evidence as to what was paid by either party since the orders for temporary support were made." The court noted its March 10, 2014 order specifically stated the court would consider the payments made by Bill.

"Awards of temporary spousal support rest within the broad discretion of the trial court and may be ordered in 'any amount' (§ 3600) subject only to the moving party's needs and the other party's ability to pay. [Citation.] Permanent support, by contrast, is constrained by numerous statutory factors set out in section 4320." (*In re Marriage of Murray* (2002) 101 Cal.App.4th 581, 594.) "Whereas permanent spousal support "provide[s] financial assistance, if appropriate, as determined by the financial circumstances of the parties after their dissolution and the division of their community property," temporary spousal support "is utilized to maintain the living conditions and standards of the parties in as close to the status quo position as possible pending trial and the division of their assets and obligations." (In re Marriage of Wittgrove (2004) 120 Cal.App.4th 1317, 1327 (Wittgrove).)

Awards of temporary child support also rest within the trial court's discretion. (*Wittgrove, supra*, 120 Cal.App.4th at p. 1327.) Trial courts are required to "adhere to the statewide uniform guideline and may depart from the guideline only in the special circumstances set forth in this article." (§ 4052.) "The court shall apply the guideline by dividing child support obligations among the parents based on income and

⁸ Kim requests retroactivity extending back to March 1, 2014 because Bill resided in the family home until just before that date.

amount of time spent with the child by each parent, pursuant to Section 4053.”

(§ 4052.5, subd. (a).) An appellate court’s “review of factual findings is limited to a determination of whether there is any substantial evidence to support the trial court’s conclusions. [Citation.]” (*Wittgrove*, at p. 1327.)

Thus, in regard to Kim’s retroactivity request, at issue below (1) with respect to temporary spousal support, were *Bill’s ability to pay* and *Kim’s needs* during the four years from Kim’s proposed retroactivity date of March 1, 2014 to the award of permanent support on April 25, 2017, and (2) with respect to temporary guideline child support, were each parent’s *income* and *time spent* with each then minor child during those three years. Correspondingly, on appeal, the salient inquiries for this court are whether substantial evidence supports the court’s factual findings as to the above factors, and whether the court abused its discretion in determining it had inadequate evidence of the parties’ payments since March 1, 2014.

Normally, temporary support orders are final when made and are not retroactively modifiable. (*In re Marriage of Gruen* (2011) 191 Cal.App.4th 627, 631 [“the family court exceeded its jurisdiction by modifying a pendente lite child and spousal support order in favor of the wife. The Legislature expressly intends that temporary support orders may not be modified retroactively”].) The rule is otherwise, however, when the court expressly reserves jurisdiction to amend the award based on the anticipated presentation of subsequently acquired information. (*In re Marriage of Freitas* (2012) 209 Cal.App.4th 1059, 1075 [“neither *Gruen*, nor the authority upon which *Gruen* is based, precludes a trial court from reserving jurisdiction to amend a *nonfinal* order based on the anticipated presentation of additional evidence”].) Here, in making the temporary support orders, the court expressly made such a reservation of jurisdiction, stating: “Court reserves the issue of retroactivity for child support and spousal support to be heard at the time of trial. Court also notes that [Bill] shall be given credit for any and all payments made by him in calculation of any arrears or overpayment at the time of

trial.” Thus, the court’s express reservation of jurisdiction rendered the temporary support orders interlocutory, not final.

At the March 10, 2014 hearing on Kim’s RFO, the parties agreed with this reservation of jurisdiction. The QDROs had not been adjudicated at the time of the hearing but the parties nevertheless understood that each of them would be receiving payments from the pension distributions when the QDROs were completed. But no decision had been made as to the amounts each would receive from the pension distributions and whether the amounts paid to the parties would be made from qualified funds or nonqualified funds, or some combination thereof. Moreover, it was uncertain *when* the QDROs would finally be adjudicated. Thus, it made sense to the court and to the parties to reserve jurisdiction on the temporary orders until the time of trial when the actual income to the parties from the pension distributions would be determined, if not determined prior to trial.

As noted above, the parties ultimately reached agreement on the QDRO issues in November 2014, just over a year prior to trial. The decision on retroactivity of the support orders remained deferred, however, until the time of trial.

The court’s reason for denying a retroactive amendment of the temporary support orders does not withstand scrutiny. The court’s rationale was succinct but off-point, with the court stating: “Court denies the request for retroactivity of child support and spousal support orders herein to the date of previous orders made on March 10, 2014. The court finds that the court was not presented with evidence as to what was paid by either party since the orders for temporary support were made.” This rationale presupposes that Bill either (1) underpaid his support obligation under the temporary orders and Kim was seeking a support arrearage, or (2) that Bill had overpaid his support obligation and was seeking a reimbursement. There is no other reason to have required an accounting of the payments made under the temporary orders. And there is no evidence that either party was asserting either an arrearage or a reimbursement. With no

issue raised with respect to either possibility, the amount of the actual payments made or received was entirely irrelevant.

Kim's failure to seek an arrearage, and Bill's failure to seek a reimbursement, results in the reasonable inference that Bill had fully complied with the temporary orders as written (or at least any noncompliance was so minimal as to not merit a challenge). The sole remaining issue was whether consideration of the actual income of the parties merited a retroactive amendment of the temporary support orders. The parties' respective tax returns in evidence for 2014 and 2015 showed not only the taxable income of each party, but also showed their agreement on how much had been paid and received during those years for spousal support.⁹ Of course the tax returns do not disclose amounts paid and received for child support, but again, because no issue was raised by either party regarding noncompliance, it is a reasonable inference that those payments also complied with the temporary orders.

Thus, we conclude the court abused its discretion by refusing to consider whether a retroactive modification of the temporary support orders was merited. The court's reasoning was based solely on the absence of irrelevant evidence. The actual income of the parties derived from the pension payouts was known at the time of trial. That was the only additional evidence the court needed to allow consideration of whether a retroactive modification was appropriate. We will remand to allow the court to make that determination, as the court had promised to do on March 10, 2014.

⁹ We compare Bill's tax deduction for spousal support with Kim's taxable income from spousal support. They match exactly for both 2014 and 2015. In 2014, Bill reported a spousal support tax deduction of \$42,795 and Kim reported spousal support income of the same \$42,795. Similarly, in 2015 Bill reported a spousal support tax deduction of \$58,200 and Kim reported spousal support income of the same \$58,200.

Permanent Child and Spousal Support

Kim contends the court's permanent child and spousal support awards were unfairly low. She argues that "had the court awarded combined spousal and child support at the marital standard of living of \$19,500 per month for a reasonable time, Bill would still retain 51.5% to 57.68% of this income without considering any of his other considerable retirement."¹⁰ Kim argues a court must consider the marital standard of living and the other section 4320 factors, and may not impute earning capacity unless the party appears to be avoiding his or her responsibilities and "it would be in the best interests." She contends Bill's current income at the time of trial gave him a higher standard of living than hers. She complains the court did not consider the hardship to her resulting from the need to retrain for a career.¹¹

As we shall discuss, the court did not abuse its discretion when it fixed the amount of the permanent spousal and child support awards. As to spousal support, the court thoroughly considered the statutory factors (including Kim's earning capacity) and the underlying evidence admitted at trial. As to child support, the court reasonably imputed income to Kim.

¹⁰ Kim's calculation is based on Bill's alleged "income from the Pension, wages plus bonus, [and other unidentified] considerable retirement assets" Apparently, Kim considers Bill's qualified funds distributions to be income, although she characterized her own as an "asset" on her income and expense declaration filed February 9, 2017. She asserts that Bill turned 59 and one-half years old in July 2017 (i.e., after the issuance of the April 2017 statement of decision), and therefore his qualified retirement assets and income became available to him without penalty. She asserts he has "amassed a considerable amount of separate property;" yet she does not appear to include her separate property inheritance in her calculations.

¹¹ In her reply brief, Kim raises for the first time her contention the court violated M.'s right to child support after age 19 and abused its discretion by requiring the parties' mutual consent to nonemergency healthcare for M. We do "not address arguments raised for the first time in the reply brief" because it would be unfair to the opposing party. (*Provost v. Regents of University of California* (2011) 201 Cal.App.4th 1289, 1295.)

“In awarding spousal support, the court must consider the mandatory guidelines of section 4320.” (*In re Marriage of Kerr* (1999) 77 Cal.App.4th 87, 93, fn. omitted.) “[T]he weight to be given each statutory factor is within the trial court’s broad discretion.” (*In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 308 (*Cheriton*).) Once the court has considered the statutory guidelines, “the ultimate decision as to amount and duration of spousal support rests within its broad discretion and will not be reversed on appeal absent an abuse of that discretion. [Citation.] ‘Because trial courts have such broad discretion, appellate courts must act with cautious judicial restraint in reviewing these orders.’” (*Kerr*, at p. 93.)

A “trial court may consider earning capacity in determining spousal support” (*Cheriton, supra*, 92 Cal.App.4th at p. 308.) Similarly, a “trial court’s decision to impute income to a parent for child support purposes based on the parent’s earning capacity is reviewed under the abuse of discretion standard. [Citations.] ‘Under this standard, “[t]he appellate court should not substitute its own judgment for that of the trial court; it should determine only if any judge reasonably could have made such an order.’”” (*In re Marriage of Destein* (2001) 91 Cal.App.4th 1385, 1393.)

As to Kim’s earning capacity, the court found she “is a licensed attorney in the State of California with her license currently on inactive status. [Kim] has to pay a fee to activate her license and complete her continuing education requirements [Kim] has ten years of experience practicing law but has not worked in the past 17 years while she has attended to domestic duties. [Kim] has not made any serious attempts to become reemployed in the legal field or any other field at this time despite the court issuing a *Gavron* Warning to [her at the] March 10, 2014 hearing on a Request for Order for support and custody. [Kim] testified that she has taken classes to become a financial planner and evidence presented that the classes at UCI would cost \$6,100[] and take three years to complete her hours under the guidance of a Financial Planner. [Kim] also stated that she would like to find a job with the bank in their compliance department under the

new law regarding children with disabilities. [Kim] as per the testimony provided by the Vocational Examiner and the report entered into evidence as Exhibit A and B, has the ability to become employed full time as an attorney or a paralegal, making at the low end \$50,000[] and at the high end \$123,000[] per year at entry level. [Kim] could reach the high end if she were to reactivate her license to practice law. [Her] desire to become a certified financial planner was not the focus of the vocational exam and [the Vocational Examiner] testified that there was ability and opportunity for [her] to become employed at this time. Court finds and orders that [she] is capable of earning \$3,000[] per month working part time.”

The court further found Kim was able “to engage in gainful employment without unduly interfering with the interests of [M.: Kim] testified that she has not been able to work full time due to the special needs of her son, [M.], who is a Junior in High School. [Bill] agrees that [M.] has special needs in schooling, suffering from ADHD and a speech impediment. [M.’s] school has put [M.] on an independent education plan to address some of these issues. However, [Kim] testified that [M.’s] needs are much more than the school is willing to provide and therefore she supplements with speech therapy, occupational therapy and counseling. These needs require her time and preclude her from working full time. [Bill] disagrees with this. The court finds [Kim] does have the ability to work and that the needs of [M.] are not such that she cannot work and still meet his needs. Court finds that [Kim’s] contribution to [M.’s] education and school needs have been good but believes that they can be met with her working full time which [Kim] has chosen not to do. Court finds that the imputation of income is in the best interest of the children. . . . Court finds that [M.’s] needs are not as time consuming that they would require [Kim] to be a stay at home mom. [Kim’s] description of [M.’s] needs and her fight with the school and her efforts she had to [make] to ensure those needs gave an impression to the court that she was acting as a helicopter parent. Court did not find that

that [M.'s] needs were as great as [Kim] found them to be. The court finds that it was not presented with enough evidence for it to determine otherwise.”

Kim challenges these findings, arguing she is 57 years old and has not worked for over 16 years. But her efforts to find employment appear to have been minimal. She argues she submitted *two* job applications and that both were rejected. At trial she testified that a “headhunter” friend advised her to stop applying for full-time jobs when she was only able to work part-time. Kim points to her own trial testimony that, until M. graduates, even part-time work would be hard for her. (Kim testified she cannot work part-time because M. needs her help on his homework and also needs a ride to endocrinologist appointments. She testified M. was scheduled to graduate from high school in June 2018.) Kim observes she would have to complete her continuing education requirements within three years to work as an attorney. She disagrees with Bill’s vocational expert’s report, which concluded that (1) if Kim activated her license, she would be employable as a “Title Attorney” or in a “self-employment capacity,” and (2) if she chose not to activate her license, she could prepare for work as a paralegal. However, the court, as the fact finder, heard the expert’s testimony, admitted the expert’s reports into evidence, and weighed the evidence accordingly. Finally, Kim argues the court abused its discretion by finding her 17 years of unemployment would be a “hindrance” for six or eight months and nonetheless finding she was capable of earning \$36,000 per year by working part-time. The court, however, gave Kim a *Gavron* warning several *years* earlier. Furthermore, the court imputed a relatively low earning capacity to Kim.

The court found, based on the parties’ testimony, that the marital standard of living was middle class with an average income between \$210,000 to \$235,000. Inter alia, the court found the family lived frugally, and emphasized the “children’s well-being and educational pursuits.” Kim fails to show the court abused its discretion. Her

arguments on this issue focus on Bill's income *at the time of trial*, rather than on the parties' standard of living while they were married.

As to Bill's ability to pay spousal support, the court found: "[Bill] has the ability to pay spousal support to [Kim] and [Kim] has the earning capacity to earn and has significant other earned and unearned income [and] assets. Parties have significant retirement assets. Court finds that as per testimony provided [Kim's] non-qualified portion shall end in the year 2020 and [Bill's] non-qualified portion shall end in the year 2018. Court finds that spousal support shall change significantly in June 2018 upon cessation of the incomes available to parties via retirement pay out. However, the current orders for spousal support are not based on any future occurrence and only based on monies received by the parties as of today." The court found the parties were "able to maintain their standard of living but for payment of education for their adult children. Parties currently have two adult children in college and both contribute to the support with [Bill] paying majority of the cost and [Kim] contributing where ever she is able to do so but more insignificantly so. Although both parties want the court to consider [the college costs] in their expenses, the court did not consider this factor in deciding support as the obligation to provide spousal support to spouse is higher than the obligation to provide support to adult children." The court found the "current spousal support amount creates a hardship on" Bill.

Kim contends the court failed to actually balance the hardships to each party. She complains of the hardship to her resulting from her 78 percent physical custody "of the minor children." But even M. was 18 years old on the date of the statement of decision. Further militating against Kim's hardship argument is the fact that Bill has paid most of the college tuition for the two eldest daughters, yet the court did not even factor this expense into its finding that the current spousal support obligation creates a hardship on Bill.

In sum, Kim fails to demonstrate the court abused its discretion in setting permanent spousal and child support.

Reimbursement of 2013 Taxes

Kim requests that we reverse the court's award of \$13,677 to Bill as reimbursement for 2013 taxes he paid on her behalf. Kim contends the record is devoid of evidence to support the amount of the award.

At trial, Bill requested reimbursement of \$8,781 for his 2013 tax payments. He relied on his trial exhibit M for his request of \$8,781.

The court's statement of decision states, "Court finds that the party asking for reimbursements has the burden to establish the reimbursement and prove the reimbursement. Based on the evidence provided to the court, the court orders the following: [¶] . . . [¶] (f) Reimbursement for taxes paid by [Bill] for the year 2013: The court grants the reimbursement to [Bill] in the amount of \$13,677[.]. [Kim] is ordered to pay this amount to [Bill]."

Thus, the court did not identify the substantial evidence underlying the dollar amount of its tax reimbursement order. Nor does Bill's respondent's brief on appeal point to any supporting evidence for the amount of \$13,677; in a single paragraph with no record references, Bill argues the court was presented with the 2013 tax returns and that "Kim presented no evidence to refute the evidence or evidence that she paid the liability." Consequently, we will "modify the judgment to reduce the award accordingly." (*Behr v. Redmond* (2011) 193 Cal.App.4th 517, 535.) The only evidence in the record is Bill's trial exhibit M, seeking an award of only \$8,781.

Due Process

Kim requests that we reverse the court's "ruling" and remand the dissolution proceeding to a different judge. She contends the court violated her due

process rights by denying her the opportunity to be fully and fairly heard before an impartial decision maker.

Kim first complains that the court “sent” her to seven mandatory settlement conferences and six meet and confer meetings, and asserts her resulting attorney fees and costs exceeded \$200,000, causing her to be self-represented by the time of trial. Bill counters that the multiple conferences and meetings were by agreement of the parties and that the “case was continued many times due to Kim’s failure to go forward with the hearings.” In any event, Kim does not explain how the time spent in negotiations and communications between the parties and their counsel, with the end goal of reducing attorney fees in the long run, deprived her of due process. Indeed, such conferences and meetings yielded the November 2014 stipulation on QDROs and the August 2015 stipulated judgment.

Instead, Kim’s argument seems related to her assertion the court failed to consider her request for attorney fees and costs at the temporary support hearing. But Kim’s assertion is false. The court discussed the issue of attorney fees at length at the temporary support hearing. There, Bill’s counsel argued Kim had separate property of \$650,000 and higher disposable income than Bill since Bill was “paying all the bills.” Nonetheless, the court sought to distribute some community property equally to the parties to pay attorney fees. Bill’s counsel noted the parties had stipulated to such a distribution, with Bill’s share going to his down payment on a condominium residence. The court then inquired about “liquid” community property assets, stating it wanted to avoid the negative tax consequences of invading the parties’ IRA’s. Kim’s attorney agreed the IRA’s should not be touched. Bill’s counsel stated Bill would agree to a distribution from any liquid account chosen by Kim. The court stated that if the parties did choose an account, the court would order distribution of one-half to each party. Further discussion revealed Kim had charged about \$7,000 of attorney fees to a credit card which Bill had paid. Bill stated he had offered to pay the attorney fees jointly, and

that he was told, “I’m going to bleed you with the attorney.” The court advised the parties to select a community asset which the court would order distributed between the parties, probably giving each party \$10,000 “at this point.” The court encouraged the parties to minimize attorney fees by settling. At the end of the temporary support hearing, the court asked whether there were any other questions: “Anything else?” “Are you sure?” but neither Kim nor her counsel mentioned attorney fees. Kim’s opening brief unfairly implies the court deferred the attorney fee issue to the end of trial: Kim quotes, piecemeal and out of context, the court’s explanation that the \$20,000 in distributions would be subject to reallocation and offset “[a]t the end” when the court looked at “what you are left with after this divorce.”

Similarly, Kim complains that after the settlement of her ex parte RFO for a QDRO (which also requested attorney fees, costs, and sanctions), the “court again reserved on Kim’s attorney fees and costs request.” Her record reference reveals that *Kim’s counsel*, in the course of presenting Goodman’s proposed QDRO, asked the court to decide on the “sole issue” of the QDRO “right now” and reserve on the issue of attorney fees.¹² After the parties stipulated to a QDRO, the court asked, “On reserved issues, what other issues do we have now?” Kim’s counsel advised the court the parties had agreed to meet and confer and that if there were any remaining issues, counsel would “provide a mutual report to the court as to what needs to be tried.”

Kim also contests the court’s summary denial of her RFO for a temporary emergency court order to continue trial and re-open discovery. The single paragraph in her opening brief lacks any discussion or analysis of the law governing requests for

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On the other reporter’s transcript pages on which Kim relies for her assertion the “court summarily decided to wait until trial to determine attorney’s fees and costs,” the court advised Kim she needed to bring a motion on the appropriate form(s) under sections 2030 and 2032. The court advised Kim she could “go down to self-help if” she wanted “to do this without the attorneys,” or, alternatively, her new attorneys were “welcome to bring a request for fees” and the court would consider it.

continuances and the reopening of discovery. We therefore do not consider it. (Cal. Rules of Court, rule 8.204(a)(1)(B).)

Kim also faults the court for warning her at the *temporary* support hearing to make reasonable efforts to become self-supporting. Kim relies on section 4330, subdivision (b) and *Cheriton, supra*, 92 Cal.App.4th at page 304, for the proposition the court was required to weigh the section 4320 factors before giving Kim the warning. Both section 4330 and *Cheriton*, however, concern permanent support. (*Cheriton*, at p. 282.) Moreover, no prejudice has been shown arising from the mere giving of the warning.

Kim challenges the court's dismissal of her May 11, 2016 order to show cause and affidavit for contempt regarding Bill's alleged failure to pay uninsured medical expenses. She complains the court refused to admit into evidence her expert's report on M.'s psychological needs "because Kim did not know how to lay a foundation." The court properly granted Bill's motion to dismiss Kim's contempt charge, based on (1) section 4063's requirement that the parent requesting reimbursement provide the other parent with an itemized statement of cost within a reasonable time but not more than 30 days after accruing the cost, as well as (2) Kim's failure to lay a foundation on whether the cost was a reasonable and necessary medical expense. Moreover, Kim fails to advise us why the court's June 27, 2016 dismissal is appealable at this late date.

Kim disputes the outcome on her October 3, 2016 peremptory challenge of the trial judge based on her belief he was "was prejudiced against her."¹³ The court entered (1) an order striking (Code Civ. Proc., § 170.4, subd. (b)) Kim's peremptory challenge as untimely and because it demonstrated on its face no legal grounds for

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As the court noted, although Kim styled her challenge as a "peremptory challenge," in reality, it appears to be a challenge for cause under Code of Civil Procedure sections 170.1 and 170.3, and that is how the court treated the challenge. It was far too late in the process to bring a peremptory challenge under Code of Civil Procedure section 170.6.

disqualification, and (2) in the alternative, a verified answer. Kim failed to challenge the court's order by petitioning for a writ. Her appellate challenge is therefore untimely. (Code Civ. Proc., § 170.3, subd. (d).)

Finally, Kim contends, "Objectively considering the circumstances of the case, there was actual bias or the probability of bias on the part of the judge so great as to become 'constitutionally intolerable.'" As discussed in more detail in the footnote below, Kim's allegation of bias is unfounded.¹⁴ Kim fails to show any deprivation of due process.

¹⁴ Kim insinuates the court suggested that Bill obtain a vocational evaluation, but the truth is that, at the temporary support hearing, the court granted, at Bill's expense, *his counsel's request* for appointment of a vocational examiner. Indeed, the court warned that vocational examinations had not been "helpful" in the court's experience and that the parties would save money by simply stipulating to a range of imputed income.

Kim requested a continuance on the first day of trial, because she owed "\$201,000 in attorney's fees" and was "not competent" to represent herself. The court found no good cause to continue the trial and noted the case had gone on for almost three years. The court observed there was no recent request for attorney's fees, nor a request to continue trial. But the court advised Kim it would allow her at any time to bring in an attorney who would be given "a few days to get up to speed."

Kim argues Bill is legally required to work until he is 65 years old, relying on *In re Marriage of Stephenson* (1995) 39 Cal.App.4th 71, 80, and faults the court for telling Bill it (the court) could not force him to continue working. *Stephenson*, however, explained that "a spouse's obligation to continue support is predicated upon the enumerated statutory criteria including reasonable earning capacity under the circumstances, regardless whether there is evidence of deliberate avoidance of support obligations." (*Id.* at p. 74.)

At trial, Kim clarified she was alleging Bill had breached his fiduciary duty by violating *every* agreement the parties had made throughout the case. The court indicated it would have the parties pay equally for a special master on the issue of breach of fiduciary duty, because the court did not have time "to go through everything that was done and why it was done."

As to the court's imputing income to Kim, a court's rulings against a party "do not establish a charge of judicial bias, especially when they are subject to review." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1112, overruled on another point in *People v. Rundle* (2008) 43 Cal.4th 76, 151.)

Attorney Fees

Kim requests that we reverse the court’s ruling on attorney fees and remand the matter to the trial court with directions for it to award her attorney fees and costs in the amount of \$193,223.43.

Kim first reprises her argument the court refused to consider the issue of attorney fees at the temporary support hearing. As discussed above, that assertion is false.

Kim next faults the court’s ruling at the end of the case that each party should bear his or her own attorney fees. The court’s written ruling devoted over five pages to applying the section 4320 factors. The court also noted its duty to limit an award to reasonably necessary fees, citing *In re Marriage of Turkanis & Price* (2013) 213 Cal.App.4th 332, 356.

Kim argues: “Kim’s Points and Authorities and Declaration in Support of the Request for Attorney Fees and Costs provides substantial evidence that Kim should have been awarded her attorney fees and costs. The parties’ community property assets were primarily in Bill’s possession and control for which Bill consistently failed to fully and accurately disclose.”¹⁵ This argument and analysis — cursory as it is and pointing us to over 300 undifferentiated pages of the clerk’s transcript — constitutes inadequate briefing to contest the court’s ruling. (Cal. Rules of Court, rule 8.204(a)(1)(B); *Duarte v. Chino Community Hospital* (1999) 72 Cal.App.4th 849, 856 [party’s duty to provide “exact page citations”].)

The court did not abuse its discretion by ruling that each party would bear his or her own attorney fees.

¹⁵ In Bill’s respondent’s brief, he responds to Kim’s arguments in her opening brief. In her reply brief, Kim substantially enlarges on her contention and raises new arguments in support. In fairness to the respondent, we do not consider arguments raised in the reply brief and not elicited by the respondent’s brief. (*Provost v. Regents of University of California, supra*, 201 Cal.App.4th at p. 1295.)

DISPOSITION

The judgment is modified as to subparagraph (f) of the Reimbursements section of the statement of decision: The award of reimbursement to Bill of \$13,677 for 2013 taxes is reduced to \$8,781. The court's denial of a retroactive modification of the temporary support orders is reversed and the matter remanded for the court to consider whether a retroactive modification is merited based upon the actual income of the parties during the period from March 10, 2014 to the commencement of trial. In all other respects, the judgment is affirmed. The parties shall bear their own costs on appeal.

IKOLA, J.

WE CONCUR:

MOORE, ACTING P. J.

GOETHALS, J.